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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and
Respondent,

v.

DANIEL DEALBA,

Defendant and
Appellant.

B303584

(Los Angeles County
Super. Ct. No. PA073050)

APPEAL from an order of the Superior Court of Los Angeles County, Michael Terrell, Judge. Affirmed.

James Koester, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Senior Assistant Attorney General, Kristen J. Inberg and

Rene Judkiewicz, Deputy Attorneys General, for Plaintiff
and Respondent.

Defendant and appellant Daniel Dealba appeals from the denial of his petition for resentencing pursuant to Penal Code section 1170.95¹ and Senate Bill No. 1437 (Senate Bill 1437). We affirm the trial court's order denying Dealba's petition.

PROCEDURAL HISTORY²

In 2013, Dealba was convicted of attempted murder (§§ 187, subd. (a), 664, subd. (a) [count 1]), criminal threats (§ 422, subd. (a) [count 2]), and assault with a deadly weapon (§ 245, subd. (a)(1) [count 3]). The jury found true the special allegation that the attempted murder was willful, deliberate, and premeditated. The trial court sentenced Dealba to life in prison in count 1, a concurrent term of two years in count 2, and a term of three years in count 3, which the court stayed pursuant to section 654.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² The summary of the underlying proceedings is taken from our prior unpublished opinion in *People v. Dealba* (Jan. 29, 2015, B249908). We do not include a recitation of the underlying facts of the offenses as they are not necessary to our resolution of the issues.

Dealba appealed, arguing, as relevant here, that there was insufficient evidence to support the jury’s special allegation finding that he intended to kill the victim or that he acted willfully, deliberately, and with premeditation, and that the trial court erred in failing to instruct sua sponte on attempted voluntary manslaughter. We affirmed the trial court’s judgment.

On September 30, 2018, the Governor signed Senate Bill 1437. (*People v. Martinez* (2019) 31 Cal.App.5th 719, 722.) “The legislation, which became effective on January 1, 2019, addresses certain aspects of California law regarding felony murder and the natural and probable consequences doctrine by amending Penal Code sections 188 and 189, as well as by adding Penal Code section 1170.95, which provides a procedure by which those convicted of murder can seek retroactive relief if the changes in law would affect their previously sustained convictions.” (*Id.* at pp. 722–723.)

In September 2019, Dealba petitioned to be resentenced under section 1170.95, using a standard form. The form contained a check list of requirements for eligibility under section 1170.95, subdivision (a). Specifically, the petitioner was required to certify that: “1. A complaint, information, or indictment was filed against [the petitioner] that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine. [¶] 2a. At trial, [the petitioner] was convicted of 1st or 2nd degree murder [¶] . . . [¶] 3. [The petitioner] could not now be convicted of

1st or 2nd degree murder because of changes made to Penal Code §§ 188 and 189, effective January 1, 2019.” Dealba checked all three boxes. He also checked the boxes indicating that he “did not, with the intent to kill, aid, abet, counsel, command, induce, solicit, request, or assist the actual killer in the commission of murder in the first degree[,] . . . [and] was not a major participant in the felony or [he] did not act with reckless indifference to human life during the course of the crime or felony.” Dealba requested that counsel be appointed to represent him. Dealba attached the abstract of judgment, which reflected his conviction for attempted willful, deliberate, and premeditated murder; CALCRIM No. 601, relating to attempted deliberate and premeditated murder, as given to the jury in his case, and his handwritten statement requesting that his sentence for attempted willful, deliberate, and premeditated murder “under a natural and probable consequences [theory]” be vacated.

On September 19, 2019, the case was assigned to Judge Michael Terrell for review and ruling, and a hearing on the petition was scheduled to take place on November 20, 2019. Dealba was not appointed counsel.

On November 19, 2019, the People filed an opposition to the petition on the grounds that Dealba was never charged with, nor convicted of, first or second degree murder, and was therefore ineligible for relief under section 1170.95. The record does not include proof that the

opposition was served on Dealba or counsel acting on his behalf.

The trial court held the hearing on the petition on November 20, 2019, as scheduled. Dealba was not present in court and not represented by counsel. The Deputy District Attorney was present. The minute order reflects that the court read and considered the petition for resentencing and the People's opposition, and found that Dealba was ineligible for relief as a matter of law because he was convicted of attempted murder, not murder. Dealba timely appealed.

DISCUSSION

On appeal, Dealba argues that the trial court's "engagement of a response from the District Attorney's office without affording [Dealba] an opportunity to reply was contrary to the process outlined in Penal Code section 1170.95 and constructively denied him fundamental due process rights and assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to [the] United States Constitution and Article 1, section 15, of the California Constitution." Dealba argues that although "the trial court's initial summary evaluation of [Dealba's] petition is arguably a ministerial gatekeeping function designed to weed out patently ineligible defendants, once the court accepted and considered the prosecution's written opposition, the proceedings became adversarial and triggered [his] federal and state constitutional rights to assistance of

counsel.” He asserts, that, given the uncertainty in the law with respect to whether 1170.95 applies to convictions for attempted murder, competent counsel could convince the court of his eligibility.

We disagree with Dealba that the court may not accept or consider the prosecutor’s response prior to appointing counsel to a petitioner. Section 1170.95 requires the prosecution to serve and file a response within 60 days of service of the petition. (§ 1170.95, subd. (c) [“[t]he prosecutor *shall* file and serve a response within 60 days of service of the petition” (italics added)].) We agree that courts are prohibited from holding resentencing hearings outside the presence of both a petitioner and his or her counsel. (Cal. Code Jud. Ethics, canon 3B(7) [“[a] judge shall not initiate, permit, or consider ex parte communications, that is, any communications to or from the judge outside the presence of the parties concerning a pending . . . proceeding, and shall make reasonable efforts to avoid such communications”].) In this case, however, the error was harmless under both the state and federal standards of prejudice. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*) [prejudice results if there exists a reasonable probability of a more favorable result absent error under California Constitution]; *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*) [prejudice results if error is not harmless beyond a reasonable doubt under United States Constitution].)

Contrary to Dealba’s assertions, whether section 1170.95 applies to a defendant convicted of attempted

murder is not an area of unsettled law. The plain language of section 1170.95 applies only to murder convictions by trial or by plea: “A person convicted of felony murder or murder under a natural and probable consequences theory may file a petition with the court that sentenced the petitioner to have the petitioner’s murder conviction vacated” (§ 1170.95, subd. (a); see *People v. Cervantes* (2020) 44 Cal.App.5th 884, 887; *People v. Medrano* (2019) 42 Cal.App.5th 1001, 1016–1018, review granted March 11, 2020, S259948 (*Medrano*); *People v. Larios* (2019) 42 Cal.App.5th 956, 969–970, review granted Feb. 26, 2020, S259983 (*Larios*); *People v. Munoz* (2019) 39 Cal.App.5th 738, 754, review granted Nov. 26, 2019, S258234 (*Munoz*); *People v. Lopez* (2019) 38 Cal.App.5th 1087, 1104–1105, review granted Nov. 13, 2019, S258175 (*Lopez*).)

Moreover, none of the cases upon which Dealba relies support his position. While *Medrano, supra*, 42 Cal.App.5th 1001; *Larios, supra*, 42 Cal.App.5th 956; and *People v. Sanchez* (2020) 46 Cal.App.5th 637, review granted June 10, 2020, S261768 (*Sanchez*), all conclude that Senate Bill 1437 applies to attempted murder on direct appeal, *Medrano* and *Larios* have also held that defendants convicted of attempted murder are not eligible for resentencing under section 1170.95. (*Medrano, supra*, at pp. 1015–1018; *Larios, supra*, at pp. 968–970.) The court in *Sanchez* did not address the issue. Several other courts have come to the conclusion that section 1170.95 does not apply to attempted murder. (See, e.g., *Munoz, supra*, 39 Cal.App.5th 738; *Lopez, supra*, 38

Cal.App.5th 1087; *People v. Dennis* (2020) 47 Cal.App.5th 838, review granted July 29, 2020, S262184.) No court to date has held that section 1170.95 provides relief for defendants convicted of attempted murder. We agree with the result in these cases.

If we were to remand this case, the trial court would be bound to find Dealba ineligible for relief as a matter of law because he was convicted of attempted premeditated and deliberate murder, as demonstrated by the official court records attached to his own petition. Thus, even if the trial court erred, there could be no prejudice. (See *Watson, supra*, 46 Cal.2d at p. 836; *Chapman, supra*, 386 U.S. at p. 24.)

DISPOSITION

The trial court's order denying Dealba's petition for resentencing under section 1170.95 is affirmed.

MOOR, J.

We concur:

RUBIN, P. J.

KIM, J.